ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
May 5, 2020

Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met by video teleconference on May 5, 2020. The following members, liaison members, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge James C. Dever
Professor Roger A. Fairfax, Jr.
Judge Gary S. Feinerman
Judge Michael J. Garcia
Andrew Goldsmith, Esq.[1]
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Bruce McGivern
Judge Jacqueline H. Nguyen
Catherine Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Jesse Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Standing Committee Reporter
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Counsel, Rules Committee Staff
Allison Bruff, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center

Ms. Donna Elm, Esq., a former member, was in attendance. And the following attended as observers:

Patrick Eagan, from the American College of Trial Lawyers
Peter Goldberger, from the National Association of Criminal Defense Lawyers
John Hawkinson, a freelance journalist who expressed interest in Rule 16

[1] Mr. Goldsmith and Mr. Wroblewski represented the Department of Justice.

Opening Business

Judge Kethledge observed that it was the first meeting for Judge Nguyen and Professor Fairfax, and he noted that this was Judge Campbell's last Criminal Rules meeting as chair of the Standing Committee. He thanked Judge Campbell for his outstanding contributions to the Advisory Committee's work, particularly his suggestion of the miniconferences that were critical to the development of the Rule 16 and 16.1 proposals. Judge Kethledge also noted that the terms of Judge Dever and Judge Feinerman were expiring, and he thanked them for their service.

Judge Kethledge thanked Ms. Elm for joining the meeting. After making significant contributions at the Committee's Rule 16.1 miniconference, Ms. Elm joined the Advisory Committee as the representative from the Federal Public Defender world. Although she retired from the committee after our fall meeting, Ms. Elm had been asked to continue in an informal capacity to provide her perspective until her replacement has been named.

Judge Kethledge presented the Rules Committee Staff report, referring members to the agenda book materials. He added that the Supreme Court transmitted newly adopted rules to Congress on April 27 (though there were no Criminal Rules included), and that the CARES Act (included in the legislation chart) would be discussed later in meeting.

The minutes were unanimously approved with two changes:

Page 36 – third bullet should read "defendant states" and not "government states"
Page 37 – fourth paragraph contains word "allegations" when it should read "obligations."

Rule 16

Judge Kethledge moved to item 2 on the agenda, the proposed amendment to Criminal Rule 16. After summarizing the history of the Advisory Committee's effort to amend the expert disclosure provisions of Rule 16, he turned to two concerns that were raised during the Standing Committee's discussion of the draft proposal at its January meeting.

Defendant's "case-in-chief"; government rebuttal witnesses. At the Standing Committee meeting, Judge Campbell asked the Advisory Committee to examine further its decision to change the scope of the defense disclosure from that in the current rule—testimony the defense intends to present as "evidence at trial"—to testimony it intends to present "in its case-in-chief." He suggested that if the rule should be reciprocal, perhaps each party should disclose expert testimony intended as "evidence at trial." The reporters examined this suggestion in their memorandum to the subcommittee (Tab 2B, p. 101 of the agenda book), and the subcommittee discussed it at length.

Ultimately, Judge Kethledge explained, the subcommittee decided to (1) retain the case-in-chief term for both the government and defense disclosures and (2) add new language

regarding the government's obligation to disclose certain rebuttal expert witnesses. The language, suggested by Judge Feinerman and approved unanimously by the subcommittee, appears on lines 12 through 14 of the proposed amendments to the rule, on page 131. It requires disclosure of evidence the government intends to use at trial "during its case in chief or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." In the subcommittee's view, this is a sensible addition and is needed to provide adequate notice to the defendant of expert testimony that the government knew—before trial—that it would be using at trial. But it was limited to government experts intended to rebut an expert the defendant had already disclosed in a timely manner prior to trial. To explain this addition, language in the note was added at lines 15-17 on p 125.

Mr. Wroblewski commented that he had concerns about how this process would actually work in practice, noting that in the Department's experience most of this happens very close to trial and not, as in civil cases, months and months before trial. The Department requested the language in the note that would alert the trial judge that there needs to be sufficient time between each of these disclosures to allow the other side time to respond, including allowing the government to respond to the defendant's disclosure. Despite the reservations, for the time being the Department supports it and thinks it is a sensible, orderly process, he said. He will circulate this proposal around the Department and might come back with some suggested changes later on.

Mr. Goldsmith agreed that this is a fair and reasonable solution, but he was concerned about what would occur when a defense expert pops up during or just before trial. He suggested the note could make it clearer that the government's obligation is not triggered unless the defense has done what it supposed to do under the Rules. In practice these rules most of the time are going to be applied against the government. Judges rarely preclude the defense from putting on an expert because of its failure to comply with Rule 16. This is potentially a trap for prosecutors if they attempt to have an expert respond to a defense expert that popped up at the last minute, since it requires an understanding that the government has a pretrial disclosure obligation only if it got the timely defense disclosure prior to trial. So this is a good solution, but he wondered if there were a way to make it clearer that when the defense has not made the required pretrial disclosure, the government's obligation does not kick in.

Judge Campbell said the additional language was a good change, and it addressed the issue he had raised. Mr. Goldsmith's concern is addressed to some degree by the language that will now be in 16(b)(1)(C)(ii), p. 136, lines 82-84, which says that the time for the defense disclosure must be sufficiently *before* trial to provide a fair opportunity for the government to meet the defendant's evidence. The way the government meets the defendant's evidence is with another expert. This is clearly required in the rule and seems fairly obvious. Judge Campbell also suggested adding something in the note that says the judge should keep in mind that the government may need to identify an expert after the defense disclosures and should take that into account in deciding when everybody's disclosures are due. When Professor King drew his attention to the note language on page 125 of the agenda book, line 26 ("Deadlines should

accommodate the time . . . the government would need to find a witness to rebut an expert disclosed by the defense"), Judge Campbell said that it addressed his concern.

Speaking to Mr. Goldsmith's concern, Professor Beale said she thought the rule was clear. It says in response to "timely disclosure" and specifies when the defense must disclose. If the defense makes an untimely disclosure, then presumably the judge is not going to penalize the government for its failure to disclose in response.

Mr. Goldsmith expressed concern that people would stop reading at line 17 of the note and not read the next paragraph. It would be helpful to have something on line 17 that refers to the language that follows. He also suggested that because government rebuttal witnesses are more likely to come up as a result of what happens at trial, rather than as a result of what happens pretrial, to make it clear that this is contemplated in the pretrial context, this could read disclosed "pretrial" under (b)(1)(C). Professor Beale asked how district judges' orders address something that pops up during the middle of trial.

Judge Campbell responded that he could not imagine a judge would preclude the government from using an expert who was needed for rebuttal only because of testimony from a defense expert that had not been disclosed before trial. That is not going to happen. It is implicit in line 17 that we are talking about pretrial disclosures. He did not share the concern that the government will be trapped when the defense disclosure comes so late. Several other members expressed agreement with Judge Campbell's comments. One also pointed to subsection (b)(1)(C)(ii), which tells the court that it must set the time for the defendant to make a disclosure, and that time must be sufficiently "before trial" for the government to meet the defendant's evidence. Another explained that most district judges would consider whether the late defense disclosure was gamesmanship or was triggered by the way the government presented its case-in-chief, and that the word "timely" adequately protects the government.

Mr. Goldsmith said the language in (b)(1)(C)(ii) that the disclosure must be sufficiently before trial allayed his concern. He added that the concern is not only that a previously undisclosed expert appears. It is also when an expert takes the stand and strays into a different area. The concern is adequately addressed, and he appreciated the Committee's indulgence on this tangent.

Delayed disclosure of expert witness identity. Judge Kethledge noted that a second issue about the draft amendments, raised by Judge Furman at the Standing Committee meeting, concerned situations where the government knows it will put on an expert on a certain subject, but might not know in advance who that person will be. This might be, for example, a firearms forensic expert who would give a generic kind of testimony. Judge Furman had suggested adding something to the note to encourage district courts to have some flexibility with regard to the timing of the government's disclosure of the identity of such an expert. After discussion in its March call, the subcommittee decided to revise the note but not the rule.

The purpose of the amendment is to address the lack of a clear timeline for disclosures and the lack of specificity about what each party must disclose with respect to its experts, Judge

Kethledge explained. The subcommittee did not want to undermine the amendment by allowing parties to delay identifying their witness unless there is a very good reason for that delay. If the party receiving the disclosure doesn't know who the witness is, then it will not receive a lot of the information we are trying to convey. The subcommittee thought that we ought to retain as a default that the party wishing to put on an expert must disclose that expert's identity. If for some reason that presents a hardship, then the party should seek a modified deadline from the district court for the disclosure of the identity. The subcommittee added language in the note about the possibility that a party could change the identity, through a supplementation. Judge Kethledge stated that the government's feet would not be in cement with an expert it disclosed up front. It can supplement with the name of a different person. But the default is important, and it should apply to all experts unless somebody has a reason why they cannot reasonably give the identity first.

Judge Furman noted there are often experts who are generic, such as a firearms expert who testifies that DNA was not found on the gun. In such cases, the government can easily disclose, by whatever early deadline the court sets, that it anticipates presenting that testimony. But it is not in a position at that time to say who the examiner will be because it won't know when trial will be scheduled and who would be available. The concern was that there be enough flexibility that it wouldn't prevent the government from calling someone in those circumstances. He thought the committee went a good distance to address the concern in lines 75-78, p. 127, "or change in the identity of the expert." But this presumes that a person was identified in the first instance, and a judge could conceivably read this not to allow for partial disclosure of the early part and then later supplementation, which is routine when the identity of the person in those cases is not critical. He suggested adding another sentence like "It is also intended to address situations in which a party is able to make only a partial disclosure in the first instance, for example where a party intends to use expert testimony on a particular subject but is not in a position to identify the witness until closer to trial." He did not want to dilute the virtue of setting the early deadline, but was trying to find a way to leave room for flexibility.

Professor Beale said that when either party knows it is going to have an expert but doesn't know who that will be, that is a Rule 16(d) issue where you ask to delay the disclosure of the identity. If the testimony is generic and the defense is not concerned, then they won't object. But the defense may say, "No, this is important. We want to see if they have any publications. We think that you need to designate the identity and here's why we think it's important." The default ought to be that you get everything the rule requires, so that you can examine what the expert has done before, etc. There may be a class of cases where the government or the defendant can persuasively explain why there wouldn't be any detriment to the other side, and they will have plenty of chance to prepare. But if it is just the convenience of the government, that shouldn't outweigh an important interest of the defendant in getting the witness's name, prior testimony, and publications.

A member noted that ATF agents, or the gas chromatograph person, most of those things don't matter too much, and a lot of times the defense will stipulate. Often the defense has lived

just fine with knowing that somebody is going to come in and say that the gun was manufactured in another state. It is not a material issue. The only area where the defense tends to have a problem is the cop as expert, where they say we will have somebody come in and say this was a drug transaction. In that situation, the defense really needs to know the name and other information required by the amendment.

Judge Furman agreed that the key is to ferret these things out early so that if something is material defense counsel can ask the court to either order the government to disclose, or the parties can discuss it. His concern was the note, as written, does not reflect that. He asked that the note spell out that where the identity is not particularly critical and the government does not want to lock itself into to a particular expert, it can get either a protective order under 16(d), or disclose and the defense counsel can raise it with the judge if they need more information.

Professor Beale noted the language on lines 48-51 discusses a similar situation, so if it would be unduly burdensome to provide the name of a specific expert, under 16(d) the government should say, we can give you the substance but we want to give you the name of the person later. Any new language should go in that part of the note. It is the same idea that the court can modify these obligations if something is unduly burdensome.

Judge Furman said that the text of the rule and the note presume that a person is identified by the deadline and does not describe the scenario he was concerned about it. He suggested adding: "If the identity of the expert is not critical and it is not practicable to identify the expert early . . . ."

Judge Kethledge commented that this is something the government could talk about in the meet and confer, and the parties could get that sorted out before they come to the district judge and offer something that reflects a reasonable accommodation. He asked Judge Furman if he would accept that the court would have to take some action to allow the delay, and Judge Furman agreed.

Mr. Wroblewski said that the Department agreed that the rule ought to require that the substance of what the expert is going to testify about should be disclosed regardless of whether the identity of the actual human being who will testify can be identified. There is consensus on making sure the parties are informed as to what will be testified to and allowing the other party to prepare. He discussed this with some of the government's experts and AUSAs, and they read the language as requiring some placeholder name that could be changed later. That seems like an artificial way to deal with it, and it is not consistent with actual practice. So he supported the additional sentence that Judge Furman suggested. The substance must be disclosed ahead of time so that the other party has an opportunity to prepare, but if the offering party goes to the judge and says we are not going to be able to identify the actual human being for a while, that is contemplated and permissible. And the government was fine with a requirement that it must go to the court and ask for that.

Mr. Goldsmith suggested that judicial approval need not be required if the parties agree. Most of the time this will be noncontroversial, and to have to run this through the district court seems like an unnecessary step.

Judge Kethledge commented that the note currently contemplates (lines 36-38) that the parties will meet and confer under Rule 16.1 and share the results of that meeting before the district court sets the deadline. His sense was that if the parties do agree that the government can disclose the identity of a government expert witness later than the timing of the other expert disclosures, then the district courts' timing order itself could reflect that.

Judge Kethledge said he would ask the reporters to work on Judge Furman's proposed addition to the note over a break.

Having covered the principal concerns raised in the Standing Committee's meeting, he asked for any other comments regarding the rule text. Although the members approved most of the text during the last meeting, Judge Kethledge asked if they had additional thoughts or comments. No one had anything to add.

Note language summary. Judge Kethledge then asked the reporters to review changes in the note since the last meeting. Professor Beale said the order of the paragraphs had been reorganized to follow the flow of the rule itself. There were no significant changes in the first paragraph. In the second paragraph there was some modification of the way in which the note refers to the various subsections of the rule.

Lines 9-12 include the reference to the defendant's "case-in-chief" that was discussed earlier. Judge Campbell and others suggested that it was very important for the note to give the history and the rationale for the change. As the reporters' memo explains, somewhere along the line the text was changed from "case-in-chief" to "evidence at trial," seeming to expand the scope of the defense obligation. How or why that language was added is still a mystery. Our memo notes that if the defense disclosure obligations were broader than the government's, we think that would be a constitutional problem. The subcommittee worked through this and did not believe it is a change in practice to use the term "case-in-chief."

We discussed earlier the new language on lines 15-17 that refers to the government's disclosure of particular rebuttal witnesses. This requires the government to disclose a rebuttal witness only if that witness is in response to a timely pretrial disclosure by the defense. As members noted, the timely disclosure is in time for the government to prepare for trial. This three-stage process is like the trial: government's witnesses, the defense case-in-chief, then government rebuttal.

Professor King added that because language about the disclosure of rebuttal witnesses was added to the government's disclosure provisions but no similar language about defense disclosure of rebuttal witnesses was added to (b)(1)(C), it was necessary to add the word "generally" before the words "mirror one another" on line 9.

In the fourth paragraph, she continued, the only new addition is on lines 26-27. The new clause reads "or the time the government would need to find a witness to rebut a disclosure by the defense." Judge Campbell and another member suggested the cross references here and elsewhere be more complete, and the reporters agreed to do so.

Professor Beale noted that in the next paragraph, at line 35, the subcommittee had unanimously approved a member's suggestion that because the Speedy Trial Act does not grant authority to change discovery deadlines, the note should read "discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines . . . ."

Professor King noted the language on lines 36-38 reflected the Committee's position at its last meeting that the judge should take into account the Rule 16.1 meeting in deciding when to set the disclosure deadlines. There was some concern that that the new rule could be read to require the judge to announce the deadlines at a particular time, and the note states the judge retains discretion and suggests only that the judge consider the parties' recommendations.

Professor Beale added that at the spring meeting the Committee recognized that the rule never set any timing requirements for announcing the deadlines, but there was concern that somehow people would read them in.

Professor King pointed out that two sentences had been removed from the end of the next paragraph. There was a concern at the last Committee meeting that practitioners and judges would read the new amendments as incorporating jot by jot all of Rule 26's requirements, so there was language about this added to the note. The subcommittee decided, however, that the added language was more trouble than it is worth and recommended it be deleted. The language that was removed is in the reporters' memo on page 97 of the agenda book. It had appeared after the sentence that read "Although the language of some of these provisions . . . . Which differ in many cases."

Lines 48-51 of the draft note contain the language discussed earlier, stating a party could seek a modification under Rule 16(d) should there be an expert who testifies so often that is too burdensome to catalogue all of that person's prior testimony. Professor Beale noted that this is the place where we may decide to put new language that will address the situation in which identifying the person who will testify might be too burdensome.

Professor King moved to lines 52-57, which refer to the situation where a party may have disclosed a report that already included much of the information that would be required in the expert witness disclosure. The one change that was made to this paragraph after the Committee's earlier meeting is the parenthetical on line 54 "(including accompanying documents)." The Department of Justice was concerned that some people may think that the report does not include those accompanying documents, and suggested this addition, which the subcommittee approved.

The last paragraph on page 126 concerns the signature requirement. The amended provisions recognize two exceptions. The first is when a party cannot obtain the signature despite reasonable efforts to do so; it gives an example of a witness who is not retained or employed

specifically to give the testimony. The second exception is on page 127. No signature is required if "a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided" to the defendant. This essentially carves the disclosure into two pieces as far as the signature is concerned. One piece that definitely has to be signed by the expert is the opinions, bases, and reasons. In the specific situation where a report has already provided this information, there is no need for the expert to sign the representation of publications, qualifications, and prior testimony. It is enough if that information comes from the attorney, when all of the opinions and the bases and reasons for those opinions were set forth in a report that was signed by the expert and disclosed to the defense.

Professor Beale said that second exception was intended to respond to the government's concern that under the new protocols many of its experts must abide by, if they had to sign anything more than the report they'd already produced, they would have to run everything through the review process again. It would be difficult to get them to do that, and provide no real value. You might think it wouldn't be that hard to get an expert to sign something saying these are my credentials, my publications, and my prior testimony and everything else is in my report. But for some experts, the Department told us, that would trigger the requirement to run the whole thing back again through their review process. This is an effort to make the process work better for certain experts.

The reporters also noted that the last paragraph of the note on supplementation and correction has the added language about change in identity mentioned before.

Judge Kethledge solicited comments or questions on the note language.

Distinguishing Civil Rule 26. Judge Campbell expressed continued concern about the issue at lines 45-47. The note says that we are not intending to replicate all aspects of the civil rule but does not say which we are and which we aren't. He was concerned that we are adding language taken verbatim from Civil Rule 26 into Rule 16, requiring that the disclosure "must contain a complete statement of all opinions." As he had mentioned before, the Committee Note to Rule 26 says that the expert "must prepare a detailed complete written report stating the testimony the witness is expected to present during direct examination," and many trial judges, himself included, really hold parties to that. It has to be almost a verbatim statement of the testimony that is going to be given in a civil trial. Part of the intent of the 1993 amendment to the Civil Rules was to eliminate the need to depose experts because you know everything that they are going to say. Since we are carrying over the exact same wording ("a complete statement of all opinions"), a judge reading the language on lines 45-47 would think obviously one thing the Committee did intend to bring over is the requirement that this be a verbatim statement of the opinions. He did not think that is what this Committee intended. If it is, fine. But if it is not, he suggested two possible changes.

The first was to change the use of the word "testimony" in the note, lines 4 and 5. Replacing "testimony" with "opinions," not intended to be an actual statement of the "opinions,"

might help. There are about ten places in the note where it says testimony. That would help. The second change would be to add a sentence at line 47 that addresses this head on, and says "The amendment requires a complete statement of all the opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial." This would make it clear we are not carrying over that obligation of the civil rules even though it is a more robust disclosure than we had before.

Judge Kethledge said this was helpful and asked for reactions to those suggestions.

One member said that as a defender she liked the word "testimony." She thought the word "opinions" is looser, "testimony" is more specific. The defense sometimes gets very vague, nebulous notice, and the word "testimony" tends to pin that down. Perhaps a compromise would be adding Judge Campbell's language to the end of that paragraph without changing the word "testimony" throughout.

Another member stated he thought Judge Campbell had put his finger on something important, and he supported the suggestion. When asked about whether to cure this by an express statement at the end of line 47 that the disclosure need not be a verbatim recitation of the testimony as opposed to change "testimony" to "opinions" elsewhere, this member expressed the view that "testimony" is more nebulous than "opinions." "Opinions" gives the defense a better position than it has under "testimony." He commented that it would never occur to him that it is necessary to have a report that states *in haec verba* everything the witness is going to say.

Judge Campbell stated that he was not concerned about changing the word "testimony" to "opinions" if we do have that clear statement that we are not carrying over that concept from the Civil Rules, assuming it is not the Committee's intent to carry over that concept.

Mr. Wroblewski said that the Committee and the subcommittee agree that the complete statement is of the opinions. The rule itself says complete statement of "opinions," not "testimony," and the added sentence that Judge Campbell suggested would be well advised.

Judge Kethledge agreed that unless someone has a specific, concrete reasons to change from "testimony" to "opinions" throughout, then we ought to go with the narrower cure, so we don't inadvertently change something with a broader approach. The language that we have now has been vetted repeatedly. Judge Campbell's suggestion to go just with the sentence is the narrower way to do this.

Professor Beale agreed that the targeted sentence seems to do the job without making other changes that might set off broader consequences.

A member moved that the Committee adopt only the sentence Judge Campbell suggested: "The amendment requires a complete statement of all opinions the expert will provide, but does not require verbatim recitation of the testimony the expert will give at trial." The motion was seconded and passed unanimously by voice vote.

A member returned to the language at lines 45-47 and asked what it adds. Couldn't that be omitted? Professor Beale explained that that sentence was a first step in responding to Judge Campbell's concern that there would be an assumption that everything would be carried over from Civil Rule 26, even if it didn't fit criminal practice. She was inclined to leave it in, particularly along with the new sentence which is the sharpest point of departure from civil practice. It was the judges and the Department that raised this issue because they see many civil cases. Noting that she had never been a civil litigator, she was not sure what all the differences are that would spring to the judicial mind. We certainly don't intend to bring over everything. The sentence at least gives courts a signal that you need to tailor this to fit criminal practice. It is not specific, but Judge Campbell's new sentence would make that one particular point more definite. Are there other specific things we would not want carried over? If not, then the new sentence is enough.

Judge Campbell explained that district judges spend a fair amount of time dealing with expert witnesses in civil cases, addressing it in every case management conference, policing it during pretrial issues, dealing with *Daubert* motions, setting strict rules about what can be done at trial. We live in that world, and this is an important signal that that world is not being carried over. The biggest concern was the notion of the verbatim statement, but there are other practices as well that judges adopt in their own case management orders for civil experts, and we still need to signal that we are not making this a Criminal Rule 26. It is a full disclosure requirement, but it is not intended to pull over all of that other stuff, and we cannot anticipate all of what that might be. Because judges live in that world with their civil practice it is an important signal to send.

Mr. Wroblewski agreed and added that this effort began when Judges Rakoff and Grimm in separate proposals both suggested bringing over all of Civil Rule 26 and the Committee quickly realized that was not a good idea. Without that sentence, especially in light of the legislative history of where this began, there will be confusion. We had very long discussions about this because Civil Rule 26 doesn't only require the verbatim disclosure, it has a whole structure that we are not bringing in, which differentiates between retained witnesses with verbatim testimony and witnesses who are not retained—who must provide a summary. This rule is different. We are not going to have the word summary in there, but we are not going to bring in the verbatim requirement. This sentence is important along with Judge Campbell's additional sentence to make the Committee's intent clear.

Judge Kethledge agreed that this sentence arises from a context where judges are inhabiting one world of civil expert disclosure, and it reminds them they can't bring all of those assumptions over. He asked the member if this discussion addresses her concerns and she said yes, noting that as a criminal practitioner, she is not familiar with that Rule 26 world. This could be a signal for people who are.

Publications. Judge Campbell asked the Department of Justice representatives if there was any ambiguity as to the word "publications." Many witnesses who testify may have created reports and papers for Department purposes. Is "publications" clear that it will not include those things? Or maybe it is intended to include those.

Mr. Wroblewski responded that there was no sense of ambiguity about the word "publications" when the language was circulated earlier. Most people thought they understood what it did and didn't mean. But after the rule is published for public comment the Department will bring this to the attention to both its forensic folks and its AUSAs to see if they have any concerns.

Returning to note language about delayed disclosure of identity. With no more comments on the text or note language, Judge Kethledge recessed the meeting for a break while he and the reporters worked with Judge Furman's proposed note language regarding delaying the disclosure of the identity of the expert.

After the break, Professor Beale reported that the draft language, to be inserted on line 29 of the note after the sentence that started "On occasion," currently read as follows: "Alternatively, it may be possible to provide a complete statement of an expert's opinions, the bases and reasons for them, but not practicable to identify the proposed witness until closer to trial, and the identity of the witness may not be critical to provide the other party with a fair opportunity to meet the evidence." That ensures, she said, that the complete statement of opinions, basis and reasons for them are provided on time. Even if you can't give prior testimony and publications of the expert, it is important to give the substance. It also has the idea that it is not critical to know the identity in the case. Under those circumstances it says a party may go to the judge to modify or delay discovery for that witness.

Judge Campbell asked whether it needed to say this was a narrow window, adding "in limited circumstances," or "in rare circumstances." Professor Beale responded this had been debated earlier in the Committee. The initial language was "In rare cases." We changed it in response to the Department's concerns to "On occasion." That suggests this is not a giant loophole that everyone can drive through, but there are cases where this is needed. It would be common as to certain types of testimony. Judge Furman added that the concern is handled by Rule 16(d) requiring good cause.[2]

The reporters' redrafted insert was shared on the screen: "Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial."

Judge Furman agreed this did the job.

Delayed identification and the signature requirement. A member asked how this provision correlates with the signature requirement. If there is no named expert there can't be a signature for the opinion. Professor Beale said that there is an exception to the signature

[2] After members offered several different suggestions for modifying the draft sentence, Judge Kethledge moved on to other items on the agenda while the reporters worked further on the language. The Committee's discussion of these agenda items appears below following the discussion regarding Rule 16.

requirement if obtaining the signature was not possible with reasonable efforts; then the party could ask for a modification. That would be the case when they don't know who the witness is. The member was concerned that to say in some situations the identity of the witness is not critical may undermine the need for the signature. Judge Kethledge said he didn't think either the court or the opposing party is going to adopt lightly the idea that the witnesses' identity is not critical or is not important. As to the signature requirement itself, he said it has an impeachment purpose not a disclosure purpose, and it seems that so long as the witness signs the disclosure before trial, that purpose is served. If there is a delayed identification, it will not impair any interest served by the signature provision. The member reiterated she didn't want to water down the signature requirement by saying two different things.

Procuring an order modifying discovery. Several members were concerned about the language following the proposed insert: "In such circumstances, the party who wishes to call the expert may, at any scheduling conference or by motion, seek an order modifying discovery under Rule 16(d)." One member said the language is contrary to what we've been doing with the electronically stored information protocol, which is that you don't go in to seek an order if you can work it out individually. She suggested adding "unless the parties have agreed to delay identification of the testifying expert," to that sentence so we don't have to go to the court when everybody agrees. Professor Beale pointed out that the sentence about seeking an order applies to both delayed identification and the situation where the expert is not under the party's control, so you can't limit it to only one of the two. Judge Kethledge added the delayed identification might also be captured in the first instance after the Rule 16.1 meet and confer, so that it is in the initial timing order.

Another member observed that in his district the parties would write up their agreement into a stipulation submitted for the judge's signature and that would be an order modifying discovery. Yet another member asked if the language, "at any scheduling conference or by motion," is necessary. It doesn't matter how you seek the order. Are we limiting it to scheduling conference or a motion? Professor Beale said that clause was requested by the Department of Justice because they were concerned that their prosecutors wouldn't know that they could raise it early and would not have to file a separate motion. Mr. Goldsmith agreed that the clause was intended to convey that it would not require some formal filing of a motion, and a party could raise it verbally during the conference. It is helpful to signal that it doesn't have to be quite as formal as a motion. When a member protested that the language would seem to preclude the parties from jointly signing a stipulation and sending it to chambers for signature, Judge Kethledge agreed it may be too prescriptive, stating we ought to trust the common sense of the parties and the court so they can do this when both parties have agreed. There was a motion to delete the clause within commas, so that it reads "In such circumstances, the party who wishes to call the expert may~~, at any scheduling conference or by motion,~~ seek an order modifying discovery under Rule 16(d)." The motion was seconded and passed unanimously by voice vote.

Motions to approve the proposed text amendments to Rule 16 and the note, as revised, and to transmit them to the Standing Committee were seconded and passed unanimously by voice vote.

Judge Kethledge thanked the members of the Committee, and he thanked Judge Campbell for his leadership and guidance which had been essential to getting to this point. He also expressed his appreciation to the Department of Justice for its good faith and reasonableness in considering this proposal, and also to the defense side in being measured and reasonable regarding what they were willing to agree to in this rule as well.

Erroneous Statutory Reference to Rule 41

Judge Kethledge turned to the suggestion by Judge Barksdale to amend the committee note to Rule 41 (Tab 4). She observed that 18 U.S.C. § 981(b)(3) includes a now-mistaken reference to Rule 41. It refers to 41(a) but the rule was amended and the provision is now in Rule 41(b). Judge Barksdale suggested that the Committee add language to the committee note that would alert the reader to the fact that the statutory reference is misplaced. Unfortunately, we are unable to do that. We can only add language to the note when we amend the rule. Here there is no reason to amend the rule, and we can't change the statute.

We learned from the Office of the Law Revision Counsel for the House of Representatives that when this sort of thing happens, they add a footnote to the code provision stating that there is a mistaken reference and pointing readers to the correct part of the criminal rule. So there is something they can do on the legislative side to fix this, as opposed to us doing something.

Judge Kethledge stated that he shared to reporters' recommendation that we not convene a subcommittee or take any action on this. There was no disagreement.

Waiver in Rules 49.1 and 59

Judge Kethledge moved to the suggestion by Judge Chagares under Tab 6 regarding the use of the term "waiver" in Rules 49.1 and 59. Judge Chagares pointed out that appellate courts have emphasized a distinction between waiver and forfeiture. Waiver is a voluntary relinquishment. It is not an oversight, but rather a decision to abandon a certain right or position in a case. Forfeiture occurs when you don't raise something in a timely fashion, typically it is more of an omission. On appeal, the courts can review forfeited issues for plain error, whereas when a party has affirmatively waived the question or the argument there will be no review. Judge Chagares observed that these two criminal rules use the term "waive" or "waiver," but might more accurately say "forfeit" or "forfeiture" instead.

The reporters recommended that we not take up this issue at the present time. The terms "waive" or "waiver" appear in additional places in the Criminal Rules and in other rules as well. So if we are going to change it here, we are going to have to change it in many places. Also, this would require action by the other advisory committees, because the relevant Criminal Rules have parallel provisions. "Waiver" has a broader usage and may be accurate in some contexts but not

in others. It is almost a term of art in some narrow contexts. This would be a broad scale project, and Judge Kethledge was inclined to think it is not substantively necessary. Professor Beale added that the reporters are very concerned about opening this up.

Judge Kethledge asked if anyone wanted to take up the suggestion. When no one indicated they did, he said he would convey the Committee's decision to Judge Chagares.

Permanent Rules for Emergencies

Judge Kethledge introduced agenda item 3, Permanent Rules for Emergencies. The CARES Act included provisions that allowed various events to take place by video and telephone conference, upon findings being made by the Joint Conference, by the chief district judge, and—with respect to sentencing—by the sentencing judge. The Act asks us to consider rules changes that would address future emergency situations. Judge Campbell worked extremely hard on the legislation, spent a great deal of time working with members of Congress and the staff, some of the judiciary committees. It was a very, very busy week or ten days for many of us, but especially so for Judge Campbell. He asked Judge Campbell if he had any remarks before we get into the project they have given us.

Judge Campbell said he wanted to thank Judge Kethledge, the reporters, Judge Furman, Judge Kaplan, and many others who contributed to what went into the legislation. In his district, the provisions in the CARES Act are working well. Defendants are consenting to video and teleconference where appropriate. Important sentencings are being put off if they are going to be more than time served so they can eventually be in person. But it has been a great relief for his court (and he thought for most courts) to be able to do things remotely rather than to simply postpone them.

As we look at this directive from Congress, Judge Campbell said, the final statute left out something Judge Kaplan had recommended. Instead of saying that the committee should study what rules should be adopted if a national emergency is declared, it should be written more broadly to refer to rules for any future emergency situations. Judge Campbell expressed the view that the statute does not preclude this Committee from writing whatever proposed amendments would be appropriate for whatever emergency situations might call for them. There was a collaborative effort that seemed to have been helpful during this emergency, and now the issue is what should become a permanent part of the rules.

Judge Kethledge emphasized that the legislative process was unavoidably rushed, and the provisions in the CARES Act were not adopted in the manner that the Rules Committees adopt amendments to rules. Our Committee has a bottom-up process where we gather data from the people who are involved in the particular issue on the ground. We have seen that most fruitfully in the miniconferences we had for the Rule 16 amendments. So rather than dictate from the top down what a rule should be, we try to get the input of people who are actually dealing with that issue, then build up from that input. And as our discussion of the one sentence in the note for Rule 16 illustrates, ours is a very deliberative process. The rules process is slow and deliberate, but that is part of the reason it has been so successful and part of the reason the rules have stood

the test of time. Another reason that the rules have stood the test of time is that they have enough flexibility to allow district judges and lawyers to adapt to most circumstances within the confines of those rules without us having to change things. He was not questioning the need for different procedures for emergencies, but he was saying that the rules have shown a resilience as a result of the parties' ability to adapt to the particular circumstances that they face, which may not be the same in every district.

Because of the nature of the legislative process, particularly a rushed process like we had, our Committee was not able to provide its advice in the way it normally would. It is important for our Committee to approach this project with a clean slate. What we hear about how the CARES Act is doing in the field is very useful data. But, he suggested, we should not regard the CARES Act as a default position or a presumptive answer to some of these problems. Our committee should bring its own independent judgment through that bottom-up process and see where we get with that. There are many other bodies in the process that would consider our advice. His point was that we need to give our advice, and we have not had a chance to do that yet, unavoidably, because of the press of this particular emergency. A subcommittee for this project will be chaired by Judge Dever, with members Judge Kaplan, Judge McGiverin, Ms. Recker, Ms. Elm on an interim basis, and Mr. Wroblewski. Judge Kethledge and the reporters will also participate.

Judge Dever commented that the Committee had a great example of the bottom-up process in committee that Judge Kaplan ultimately chaired in connection with cooperator issues. There we systematically looked at the rules, received a lot of information about cooperator issues, and thought critically about how they potentially affected each rule. We'll have an opportunity to do that in connection with this mandate, and he looked forward to working on this project with the members of the subcommittee.

Judge Kethledge said the first thing we need to do is identify the issues and the rules that our committee and the subcommittee need to think about with respect to whether they should be changed or addressed in the event of an emergency. We also need to think about the different kinds of emergencies that might arise. We are dealing with a national emergency now, and we need to consider other kinds of national emergencies. There may also be emergencies that are more local or regional. It will be necessary to hold at least one miniconference, maybe by video. And then we need to hammer out actual concrete proposals, with the idea of coming to the full Committee in our October meeting with proposed emergency procedures that would be adopted as part of the Criminal Rules. He asked Judge Campbell to share the timeline he proposed for the process.

Judge Campbell prefaced his comments by emphasizing that if this schedule turns out to be too compressed to get the job done, then we should extend it. Congress has told us do this, and they will be watching what we do. If we were to have a set of proposed rules for discussion in October, they could be reworked and considered by this Committee in the spring of 2021. Then those rules could be considered for publication by the Standing Committee in the summer of 2021, and the publication process would end in February of 2022. This Committee in its

spring meeting of 2022 could make a final decision on rules. Any rules that were approved by the Standing Committee in the early summer of 2022 could go to the Judicial Conference in September of 2022, to the Supreme Court in the fall of 2022, to Congress in May of 2023, and then become law in December of 2023. So if the Committee is able to develop draft rules in two meetings before publication, they wouldn't go into effect until December of 2023. That's fast by Rules Committee standards, but he thought it would look very, very slow from the perspective of Congress and others. We should to try to meet that schedule if we can. It would still give us an opportunity for full public comment but would condense our work in getting these rules ready for publication to two meetings, this fall and the following spring. That is an aspirational schedule. The other committees have been asked to do the same thing. But he concluded by saying Judge Kethledge is right: this needs to be done correctly, rather than quickly, and if it turns out that is too quick, we deal with it as we go forward.

Judge Kethledge said the Committee would make every effort to work on the schedule Judge Campbell proposed, and he opened discussion.

A member asked the Committee to consider adjusting Rule 53. She noted we have the ability to have really good public access, as we've seen in the Ninth Circuit. If she had been able to relax Rule 53, people could have had public access that is not very dissimilar to what they would have had by coming into a courtroom on a day-to-day basis. Providing some authority to relax a rule while we were in a crisis that would have been very helpful. They would have relaxed Rule 53, and then returned to the rule when deemed appropriate. The member wanted to consider whether there are rules that could be relaxed for a period of time then brought back on when it is important—particularly those that deal with what happens when courthouses have to be closed down, and especially with respect to criminal defendants. We have technology that easily helps us, but we can't use it because of Rule 53. This member also asked if that the Committee could consider if there is an even more aggressive timeline to use for amendments, even if temporarily, if this virus strikes again next year. Some reports are that this virus is going to hit again next fall, or next spring, and when it does we still won't necessarily have the capability to adjust the rules that we now see could be changed to more effectively deal with the public and their access to the courts. We know what would work better, and we might as well go ahead and attempt to have that happen in some way. Is there anything that can hasten us addressing this before 2023?

Judge Kethledge said the Rule 53 point is very well taken. It is something we will be looking at because public access must continue constitutionally.

Judge Kaplan said it was a privilege to have a small part helping Judge Campbell, Judge Kethledge, Judge Furman, and others involved in the CARES Act legislation. It was a fantastic performance and has worked wonderfully so far. He identified four questions that the subcommittee needs to approach.

First, how should we define the kinds of circumstances that would give some person or entity the ability to vary the normal rules? Initially, we have two fundamental obligations. One is

to ensure the ability of the courts to continue operations no matter what happens, and to do so independently. The scope of the kinds of impactful emergencies is very broad. We are dealing with this infectious disease now, and we all have that in mind. But in the past, we've had Hurricane Sandy, 9/11 (which shut down two districts in New York 20 years ago for quite some time), Hurricane Katrina (which shut down EDLA and other places). We've had floods, disease, and an external attack on the country. We can imagine circumstances where one or more courthouses could be put out of action by domestic strife. We had that in Oklahoma City years ago when the courthouse was blown up. He noted he was probably just touching the surface. Emergency ought to be defined in relation to the impairment of the ability of the courts to perform their constitutional functions. Not something else.

Second is a whole complex of issues about who decides. The CARES Act had a formulation that he was pretty comfortable with, the Judicial Conference of the United States. That happened overnight, and now we ought to think about it and make sure whatever we come up with is as apolitical and as unbiased as it can be.

Third, and reflected to some degree in the CARES Act, is we have to consider that what could trigger some relaxation might be quite local or regional. We have to determine whether the decision-making process is different in those kinds of situations.

And finally, once we've decided what is an emergency, who decides that, and how extensive it is, we must consider what does it authorize and how do we turn it off when the emergency ends?

Mr. Wroblewski agreed that the CARES Act really was a wonderful collaboration among all three branches of government and both houses of Congress. It was terrific work and a great collaboration. He stated that collaboration is continuing. There were a number of issues not resolved by the CARES Act. In addition to an issue mentioned earlier, there is the grand jury and how long the grand jury can be suspended. The Department has had a number of discussions with folks at the Administrative Office of the U.S. Courts, and with a special COVID-19 task force that the Judiciary has put together. It has made some suggestions about how grand juries may be reconstituted, and he knew that Director Duff has issued some guidance. The Department appreciates the opportunity to make suggestions. The U.S. Attorneys are working with their chief judges around the country in many districts to try to find ways to safely reconvene grand juries at some point. They are being reconvened in some districts, not in a majority of them. In addition, there is already work beginning on how to reconvene jury trials. He knew there was some thinking about that going on in the Southern District of New York and on the COVID-19 task force, and they have started work within the Department to examine a variety of issues. To the comment that jury trials remain public, he noted that the Third Circuit District Court in Michigan issued an order that they are going to broadcast trials on YouTube. He was not sure that is exactly what we want to do, but that is one of the issues we will have to look at.

Over the course of the last seven or eight weeks the Department has found a lot of wonderful expertise and a lot of serious and rigorous thinking out in the field. Some of that is

being funneled into the Judiciary's COVID-19 task force. Some he learned from talking to different judges. For example, Judge Lee Rosenthal, former chair of the Standing Committee, shared a number of orders and scripts they are using there on the border. He recommended that all kinds of judges be brought into the process to share their experiences because there is no one size that fits all. Local courts must have authority to address the particular problems in the particular way that is appropriate for that locality. He added we are so blessed to have Judge Kaplan as part of the subcommittee. He's already developed the framework.

A member added that when she heard that the Third Judicial Circuit Court in Michigan was putting their proceedings on YouTube she called to ask if she could borrow their technology, and if they could tell her how to get it done. The county courts deserve thanks because they have all let us use their platforms to get in. But they don't have Rule 53. The judges in her district could just push a button and create public access, but they are prohibited from doing so because there is no relaxation of Rule 53. Technology by 2023 will be far beyond what we know now. We have to be prepared for what the future might offer us and how we might provide access to all the people.

A member said he agreed with what Mr. Wroblewski said about trials. In the member's district (and he was sure it's the same in many districts), they have been able to handle initial appearances, custody hearings, and changes of plea when necessary and consistent with the CARES Act, and sentencings. But they have been unable to do jury trials. Because the latest order in the member's district put a pause on jury trials through the end of June, they are considering resuming trials in early July at the earliest. With guidance from the administrative office, his district imposed a blanket exclusion of time under the Speedy Trial Act through the end of June. That is not ideal, particularly for the criminal defendants who have asked to be released, have not been released, and would have gone to trial but for the pandemic. The member had not seen yet an argument from one of these defendants that the Constitution's Speedy Trial Clause provides protections that are greater than the Speedy Trial Act. Perhaps this is a problem that just can't get fixed, particularly in a pandemic-like situation. And how do you get 12 people in a building and 35-40 people for voir dire at a time like this? Maybe it can't be fixed, but hopefully it is something you can look at and try to crack that nut.

Professor Coquillette said that universities are doing a great deal of work that could be helpful to the courts. Often law school classes are close to 35 or 40 people, and we are trying to find rooms where people could be socially distanced, but still be accommodated. For example, we have learned that a group of 35-40 could gather in a room that accommodates 135 and still have reasonable safety. Some of this may help with jury trials.

A member commented that now a defendant has only one shot at bond, at release. If there is going to be a delay in trials, she suggested that there should be a second shot at release pending trials.

Judge Campbell added that in the process of looking at a number of issues the members undoubtedly will come across some that cannot be solved by a rule amendment, and he

suggested that the subcommittee maintain a separate list of potential recommendations that could be given to the Administrative Office, to the Department of Justice—and perhaps even to Congress or the Judicial Conference—of other steps to address emergencies that we ought to consider. This Committee may end up conducting the most thorough examination of these issues, and it may be very valuable for it to keep a list of things that might help.

Mr. Wroblewski followed up by stating that if anything comes up that needs the Department's attention now, you can send it along to the Department now. We are meeting every other week with the Criminal Law Committee of the Judicial Conference. He is meeting with representative from the Deputy Attorney General's office, the General Counsel for the Bureau of Prisons (BOP), and other officials from the BOP. So if issues do arise, members should feel free to email them to him or to Judge Martinez, who chairs the Criminal Law Committee. Other people including Judge St. Eve from the Standing Committee are on that call every other week, along with the BOP, probation, and a COVID-task force representative. So if any emergency situation comes up, people should feel free to contact them, because there are efforts being made now. There are enormous numbers of technical, legal, and other problems that need to be addressed sooner rather than later.

Judge Kethledge urged Mr. Wroblewski to solicit the input of his colleagues post haste, in terms of what the Department would be worried about in these situations, what changes would it want to have, so that the government would not seek changes on a midnight basis. He asked Mr. Wroblewski to do everything he could to get as much information from the Department as possible on the front end so that we can process and address those concerns, and share them with the defense bar as we go forward.

A member noted from the perspective of the Criminal Justice Act (CJA) panel attorneys there has been a tremendous response from the courts over the past 6-8 weeks, but it has been different from jurisdiction to jurisdiction. And panel representatives are not always included in many of the decisions about how to conduct the hearings and how to represent incarcerated clients you can't get in to see. You can consent to having proceedings occur by video, but how do you contact and get in to see your client and have those communications with clients to even inform them as to their options? These problems might not be addressed by amendments to the rules. But it will be great to have some uniformity, and also to understand that each jurisdiction has different capabilities and different technology. So it varies from jurisdiction to jurisdiction how much CJA panel attorneys can do on behalf of their clients.

Another member said she hoped the subcommittee will bring in expertise that is not just legal. The more we become dependent on technology to fill the gaps when courtrooms can't be open, the more vulnerable we are to cyberattack or other malfunctions of what we are all relying on now for communication. Judge Kethledge agreed technology does create some vulnerability.

Mr. Hatten observed that often the execution of these changes creates difficulties. What the CARES Act provided for our judges really facilitated operations. But some of the platforms available to conduct those proceedings, and the infrastructure that the BOP has available to

facilitate appearances, those things all cramped what could have been a better experience. In addition to rules as to what's going to be allowed, it is also important to address the infrastructure that is necessary to facilitate those. He witnessed test after test of Skype conferencing, and knows a lot of courts are fond of Zoom because of better functionality. But Zoom doesn't appear to be accepted by the Judicial Conference. Paying attention to the means we'll be using to execute these other procedures would be helpful.

Mr. Goldsmith said the Department has the expectation that these are not going to be one-size-fits-all fixes. What might be a concentration of issues from the pandemic in the Southern District of New York or the Eastern District of Michigan is not necessarily the same kind of crisis we are seeing in other parts of the country. The Department is approaching everything with the expectation that U.S. Attorneys' Offices will have some amount of latitude. Given the structure of the Justice Department is if anything more top down than the courts, that's probably an important perspective for this effort.

Judge Dever said everyone has their own terrific network, and he asked that members share whatever information they have gathered or receive in the future. He would appreciate learning from everyone about what part of the CARES Act is working, what is not, and what other rules come into play. Judge Campbell's point about other stakeholders is important; even if it is something our committee or subcommittee can't address; it is an opportunity to give voice to the judiciary's perspective on this fundamental idea of keeping our independent judiciary operating whatever the crisis might be.

Judge Campbell said collecting information may best be done through Rebecca Womeldorf and her office, but the one other judicial conference committee that is doing as much thinking and working as criminal rules has done and will do is the CACM committee. The chair, Judge Audrey Fleissig, has been very involved with the legislative issues and the issues that followed. CACM has had a broad look at problems all around the country, and it might be helpful to ask the CACM staff or Judge Fleissig to put together a list of issues the Committee might consider.

Another member said he hoped the subcommittee would be looking at the time for filing issues, noting the deadlines for Rule 33 motions for a new trial, and the one-year deadline for Rule 35 substantial assistance motions. Would any of these emergency situations consider tolling for those sorts of motions?

Judges Kethledge and Dever thanked participants for the helpful suggestions.

Rule 6

Turning to grand jury secrecy, Item 5 on the agenda, Judge Kethledge noted that the Committee received two suggestions to modify amend Rule 6 to allow for greater disclosure of grand jury material. Rule 6 has a detailed enumeration of circumstances under which the district court can allow disclosure of grand jury material. The default is that grand jury material is confidential. In 2012 the attorney general suggested amending the rule to allow district courts to have greater authority to disclose grand jury material. The Committee concluded at that time

there was no need to act upon that suggestion because district courts were already in essence doing what the suggested amendment would permit. Now we have circuit cases saying that district court can't make those disclosures. The D.C. Circuit says that enumeration is exclusive, and the district court does not have inherent authority to order disclosure of grand jury material for reasons other than those enumerated in the rule. The Eleventh Circuit en banc held the same way. We received two proposals to amend Rule 6 to allow district courts to exercise some authority to disclose grand jury material beyond what now is described in the rule. One is from the Public Citizen Litigation Group and the other is from the Reporters Committee for Freedom of the Press and other media groups. The two proposals are different. Public Citizen's has language that requires the district court to find certain pretty concrete criteria before the court could allow disclosure of the information. The other proposal has nine non-exhaustive factors that the district court would need to consider.

Professor Beale added that we also have had two recent judicial invitations to take this issue up. One is from Justice Breyer in a statement regarding denial of certiorari from the D.C. Circuit decision. The Department of Justice's brief in opposition in that case said that there was no reason to take that case because the issue could be solved by Congress or by the Rules Committees. The same suggestion was made in the Eleventh Circuit case, and these judicial suggestions were highlighted in the two proposals.

Judge Campbell added that Chief Judge Srinivasan had also raised this issue and thought it would be an important one for the committee to address. Chief Judge Srinivasan was forthright, saying he was in the majority on the panel that was reversed by the D.C. Circuit. There is now a lot of judicial attention on the issue, and a clear split in the circuits, which typically has been a situation where we have felt we ought to act. This is about as clear an invitation as we could have.

Judge Kethledge said it seemed pretty clear we ought to appoint a subcommittee, but he welcomed thoughts on that as well as on things that we ought to be considering with respect to this project.

Mr. Wroblewski said he had been dealing this issue for ten years, and Betsy Shapiro has as well for a long time. The Department of Justice has consistently taken the position in courts around the country that the list of exceptions to secrecy in Rule 6 is exclusive, and that remains its position. The Department supports having a subcommittee consider the proposal. Under Attorney General Holder the Department supported a proposal to authorize release of historically important grand jury material, and it is prepared to support a proposal now to authorize the release of historically important grand jury material. But Mr. Wroblewski noted that the Department has some differences with both the Holder proposal and with the two current proposals.

Mr. Wroblewski asked that the subcommittee also consider an additional issue: the courts' authority to authorize delayed disclosure orders through the grand jury. For many years, judges have authorized delayed disclosure of subpoenas ordering grand jury witnesses to testify or produce material. Recently in light of the decisions in the D.C. and Eleventh Circuits, some

district judges have said that they have no inherent authority to issue such delayed disclosure orders. The Department hopes the committee could consider whether there ought to be an amendment as well to address those. These orders, which are very important, are authorized as part of the Stored Communications Act. The Department thinks some language addressing that particular issue would be important and should be considered by the subcommittee.

Judge Campbell identified a third issue for the subcommittee: whether the courts have inherent authority to release grand jury materials in situations that are not enumerated in Rule 6. That is a tricky issue, in part because in 2012 this Committee took no action on the Holder proposal, noting that judges have the inherent authority to deal with the historical records suggestion. At least in that respect it appears that the Committee has already taken the position that Rule 6 does not limit a judges' inherent authority. But he raised the question whether the Criminal Rules Committee has the power to foreclose inherent authority with a rule. The Rules Enabling Act says that rules adopted through its procedures have the force of law of a statute. There is an argument that this permits the rules to foreclose inherent authority. Judge Campbell described the one other time that we tried to do that in the 2015 amendment to the Civil Rule 37(e), a pretty comprehensive rule for dealing with the spoliation of electronically stored information. The courts were adopting a wide variety of approaches, and the Civil Rules Committee intended to bring national uniformity for spoliation sanctions. The committee note stated that it was intended to foreclose resort to inherent authority. This was a very deliberate effort by the Civil Rules Committee to say we are making this exclusive. The very first district court to address Rule 37(e) considered that committee note and concluded that the Committee has no power to limit the court's inherent authority. If this Committee is going to come to the view that it wants to limit inherent authority, that's a question that will take some careful study and careful consideration of both whether it can be done and how it can be done to be most effective.

Judge Kethledge agreed that is a really interesting and important point. He expressed doubt that it was within the Committee's purview under the Rules Enabling Act as to offer an opinion as to the scope of a district court's inherent authority, but noted he would not be held to that view. We are talking about Article III. Even if we are able to comment on it, there is the separate question about what the scope of the court's authority *should* be. One possibility would be to take no position on whether the court has inherent authority, and leave that to the Article III metaphysicians. He expressed confidence that our Committee will give it very careful thought.

Judge Kethledge concluded that a subcommittee was clearly needed, and he would appoint one in the near future to begin work on this project.

Closing Remarks

Judge Kethledge said that the next Committee meeting is scheduled for October 6, 2020, in New Orleans, and hopefully we will be able to travel there. He thanked everyone for their patience with the video platform, and particularly thanked the Administrative Office staff – Shelly Cox, Brittany Bunting, and Kenneth Wanamaker – for their excellent assistance in

ensuring the meeting went well. He also expressed his appreciation for everyone's help, particularly on the Rule 16 issue.